

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

Defense Motion

For Appointment of Expert Consultants Dr.  
Allen Keller and Dr. Katherine Porterfield, and  
Defense Investigator David Fechheimer

18 September 2008

1. **Timeliness:** No specific time limitation is provided in the R.M.C. or established by the Military Commission Trial Judiciary Rules of Court for appeals of denials of defense requests for expert by the Convening Authority.

2. **Relief Sought:** The defense respectfully requests that this Commission order the appointment of (1) Dr. Allen Keller, M.D. to work as an expert consultant with the defense in the field of forensic medicine, and (2) Dr. Katherine Porterfield to work as an expert consultant with the defense in the field of clinical psychology. Depending on their findings, both expert consultants are likely to be needed as defense expert witnesses at trial and in the continuation of the suppression motion, if the defense motion for continuation is granted. The defense requests the Commission authorize the employment in advance of these expert witnesses, with their compensation as expert witnesses subject to being called to testify. In addition, the defense requests the appointment of (3) Mr. David Fechheimer as a defense investigator.

3. **Burdens of Proof & Persuasion:** The Defense bears the burden of establishing that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). “[T]he burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.” R.M.C. 905(c)(2). The burden is on the defense to establish the relevance and necessity of expert witnesses, and the necessity of expert assistance.

4. **Facts:**

a. On 5 August 2008, the defense requested the Convening Authority to appoint Dr. Katherine Porterfield as an expert consultant for the defense. Dr. Porterfield is a clinical psychologist who also has expertise in trauma and torture. (Attachment 1).

b. On 8 August 2008, the defense received the confidential full report of the 706 Board.

c. On 18 August 2008, the defense requested the Convening Authority to appoint Dr. Allen Keller, a forensic medical expert with specialized experience working with victims of abuse, trauma, and torture, as an expert consultant for the defense. (Attachment 2).

d. The Convening Authority denied the request for Dr. Porterfield on 20 August 2008. [hereinafter CA’s First Porterfield Denial] (Attachment 3).

e. The Convening Authority denied the request for Dr. Keller on 2 September 2008. [hereinafter CA's First Keller Denial] (Attachment 4).

f. On 22 August 2008, the defense submitted a request for reconsideration to the Convening Authority to appoint Dr. Porterfield to the defense team. The request was submitted as the result of new information obtained by the Defense in the confidential full report of the 706 Board. (Attachment 5)

g. On 3 September 2008, the defense submitted a request for reconsideration to the Convening Authority to appoint Dr. Keller to the defense team. The request provided additional information specifically responding to the CA's First Keller Denial. (Attachment 6)

h. On 3 September 2008, the Convening Authority denied the request for reconsideration of Dr. Porterfield. [hereinafter CA's Second Porterfield Denial] (Attachment 7)

i. On 9 September 2008, The Convening Authority denied the request for reconsideration of Dr. Keller. [hereinafter CA's Second Keller Denial] (Attachment 8)

j. The facts surrounding Mr. Jawad's upbringing, capture and detention, in addition to the fact that he is alleged to have committed a crime of violence as a juvenile, makes the evaluations by Drs. Keller and Porterfield extremely relevant and critical to the preparation of a defense and, if necessary, evidence on sentencing.

i. Mr. Jawad's life experience has been impacted by violence and war. His father was killed in the Afghan war with the Russians shortly after his birth. Mr. Jawad grew up with his mother and step-father in a refugee camp in Pakistan, where they were forced to relocate during the war.

ii. Mr. Jawad has been subjected to numerous forms of physical and psychological abuse while in custody. Beginning with his apprehension and interrogation by Afghan authorities, Mr. Jawad, a juvenile under the age of 18, may have been subjected to psychological and physical maltreatment. (Attachment 9) Mr. Jawad appeared to be under the influence of a drug while in the custody of Afghan authorities. (Attachment 10) Mr. Jawad appeared to be suffering from drug withdrawal upon being turned over to U.S. custody on the evening of 17 December 2002. (Attachment 11)

iii. Mr. Jawad, while still under the age of 18, was then transported to Bagram Control Point (BCP), where he was subjected to forced nude photography, solitary confinement, at least 11 interrogations, physical abuse, forced stress positions, and pushed down the stairs. (Investigation of Special Agent Angel Birt, Attachment 1 to D-008 Supplement 6, filed 1 Aug 08)

iv. Mr. Jawad was transported to Guantanamo on February 6, 2003 and immediately put into solitary confinement for 30 days. (Segregation Record 7 Feb 03 – 8 Mar 03, Attachment 1 to D-008 Supplement 5, filed 6 Aug 08) During nearly six years of confinement, Mr. Jawad has been subjected to additional periods of solitary confinement (Segregation Record 17 Oct 03– 16 Nov 03, Attachment 2 to D-008 Supplement 5), linguistic isolation (See, classified

attachment G1 to D-008 Supplement 5), the frequent flyer sleep deprivation program<sup>1</sup>, and abusive treatment from the guards. (Attachment 12)

v. Because of very harsh detention conditions, prohibiting him from talking to other detainees in his language, and abusive interrogation methods, Mr. Jawad ultimately attempted suicide on December 25, 2003.<sup>2</sup> (Attachment C1 to D-008, filed 28 May 08)

k. On 27 August 2008, the defense submitted a very detailed request for the appointment of an expert investigator. (Attachment 13) The defense specifically requested Mr. David Fechheimer, but agreed to accept a qualified substitute. On 17 September 2008, the Convening Authority denied the request. (Attachment 14)

## **5. Law and Argument:**

### **a. Standard for Appointing an Expert Consultant to the Defense Team**

(1) The Commission should follow the precedent established by military courts to determine if an expert consultant should be appointed to the defense team. "It is well established that a military accused has a limited right to expert assistance at government expense to prepare his defense."<sup>3</sup> In order to guarantee a fair trial, the same standard should be applied to proceedings before this commission. In *United States v. Gonzalez*, 39 M.J. 459, 461 (1994), the CAAF stated that the defense must show; (1) why the expert assistance is needed; (2) what the expert assistance would accomplish; and (3) why the defense counsel and staff are unable to gather and present the evidence the expert assistant would be able to develop.

(2) Requirements (1) and (2) of Gonzalez are exhaustively presented in attachments (1), (2), (5), (6) and (13) and incorporates the justification provided in those attachments into this motion. As the commission is well aware, there are "inherent dangers in having to reveal strategic information in order to obtain" expert assistance.<sup>4</sup> The defense has already revealed extensive defense strategy in attempting to justify the significant need for expert assistance of both Drs Porterfield and Keller, and Mr. Fechheimer. If the Commission feels additional justification is necessary, the defense respectfully requests an in camera review of the full 706 evaluation or an ex parte hearing to discuss specific needs of the defense.<sup>5</sup>

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<sup>1</sup> See generally D-008 and supplements. The government does not contest the fact that Mr. Jawad was subjected to the program.

<sup>2</sup> D-008 explains that there were conflicting reports about what actually happened and the actual intent. The defense has not been informed of any official investigation to determine which of the conflicting DIMS record entries is most accurate.

<sup>3</sup> Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW, May 1998 at 1, 16, Citing, *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986).

<sup>4</sup> Henley at n154.

<sup>5</sup> Id. citing, *See United States v. Kaspers*, 47 M.J. 176 (1997). *See also United States v. Ruppel*, 45 M.J. 578 (A.F. Ct. Crim. App. 1997) (holding that there is no right to an ex parte hearing). *But see United States v. Garries*, 22 M.J. 280, 291 (C.M.A. 1986) (indicating that the defense may be entitled to an ex parte hearing to demonstrate its need for an expert in "unusual" circumstances, though the court does not define what qualifies as "unusual").

(3) “Defense counsel, in showing the necessity for expert assistance, must be able to articulate specifically why the defense is unable to gather and to present the evidence that the assistant would be able to develop on his own.”<sup>6</sup> In meeting this portion of the *Gonzalez* analysis, it is said that the defense should answer the following questions.<sup>7</sup>

- (a) What have you done to educate yourself in the requested area of expertise?
1. Defense counsel has had preliminary discussions with a wide variety of medical and psychological experts as well as other attorneys experienced in litigating cases of this nature.
- (b) What experts and government employees having knowledge in this area have you interviewed?<sup>8</sup>
1. Dr. Katherine Porterfield
  2. Dr. Allen Keller
  3. Dr. Stephen Xenakis
  4. Dr. Christopher Lange, Forensic Psychiatry Fellowship Program Head, Walter Reed. Dr. Lange is currently involved in another commission case that may conflict with this case. There are no other qualified experts on his staff.
  5. Dr. Keith Caruso
  6. Dr. Stephen Soldz
  7. Dr. Jeffrey Kaye
- (c) If the issue in question involves a laboratory analysis by the CID or the FBI, have you requested the opportunity (using TDS funding) to visit the crime lab and to examine the procedures and quality control standards used in the laboratory in this or any other case?
1. N/A
- (d) What did you learn from the visit?
1. N/A

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<sup>6</sup> Id.

<sup>7</sup> Major David Edward Coombs, *MILITARY JUSTICE SYMPOSIUM: Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense’s Right to a Government-Funded Expert*, ARMY LAW, June 2008 at 28, 31, citing Henley, *supra* at n160.

<sup>8</sup> In addition to the listed experts the defense also unsuccessfully attempted to contact experts at the Forensic Psychiatry program in Bethesda by leaving a voice mail message for the head of the program. The call has not been returned to date.

(e) What do you need to learn that you still do not understand in order to defend the accused in this case?

1. Detailed in attachments (1), (2), (5) and (6).

(f) What treatises have you examined?

1. A treatise will not provide medical or psychological training to the defense.

(g) Are there experts other than the one requested who would meet your needs? Have you talked with them? Would providing an Army employee as an expert consultant meet your needs? If not, why?

1. The defense has been unable to locate another expert with the required training and experience to meet our needs.

2. The defense would consider a military employee with similar training and experience with Drs. Porterfield and Keller. The individual would need experience working with juveniles and victims of torture.

(h) How many other cases involving this issue have you tried?

i. None

2. Have you requested that the senior defense counsel or regional defense counsel detail another defense counsel with greater familiarity in the area of expertise to help defend the accused? N/A

3. Have you advised the accused of his right to request an IMC who has greater familiarity in this area? N/A

4. Have you requested through TDS channels that CID or other Army organizations provide you and other counsel with training in this area?

i. Defense Counsel have received training in this area. The training received emphasized to the defense the importance of retaining experts with the required experience and training to conduct appropriate testing and evaluation.

5. If this area of expertise is common to many cases in your jurisdiction, why have no such requests been made previously? N/A

(4) The unique nature of this case requires the specific education and experience of Drs. Porterfield and Keller. The defense is willing to consider other experts, with similar qualifications, suggested by the government; however the defense has been unable to locate any current government employees who possess equal or even similar qualifications.

(5) The nature of the defense of involuntary intoxication requires expert assistance for the defense. Due process of law requires, as a minimum, "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial," the accused must have "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake v. Oklahoma*, 470 U.S. 68 (1985).

**b. Statutory Provision for Expert Witnesses**

(1) In addition to appointing Drs Porterfield and/or Keller as expert consultants to the defense team, both experts should be approved in advance as expert witnesses, subject to the defense demonstrating the relevance and necessity of their testimony in a particular hearing or at trial. Obviously at the point that Dr. Porterfield and Dr. Keller become expert witnesses, they would no longer be confidential expert consultants.

(2) The MCA and the Manual for Military Commissions authorize the employment of experts to assist the parties in both the development and presentation of their cases. R.M.C. 703(d). In order to employ an expert at Government expense, a party must submit a request to the convening authority to authorize and to fix the compensation for the expert. A request denied by the convening authority may be reviewed by the military judge, who shall determine whether the testimony of the expert is relevant and necessary. R.M.C. 703(d).

**c. Standard for Authorization of Defense Experts**

(1) Rule for Military Commission (R.M.C.) 703(d) requires the moving party to show that the expert is relevant and necessary. This standard is identical to the standard for the employment of experts set forth in the Manual for Courts-Martial. *Compare* R.M.C. 703(d) *with* R.C.M. 703(d).

(a) "Relevance" is defined by the M.C.R.E. as having "probative value to a reasonable person," which means that "when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence." M.C.R.E. 401.

(b) An expert is deemed necessary when the defendant shows that there is more than a "mere possibility" of assistance from a requested expert. *United States v. Robinson*, 39 M.J. 88, 89 (C.M.R. 1994); *United States v. Kinsler*, 24 M.J. 855, 856 (A.C.M.R. 1987). The defense must show that there is a reasonable probability both that the expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial. *Id.*

(2) Once the defense has made a showing that the expert is both relevant and necessary, the Government must either provide the expert or an adequate substitute. *United States v. Tornowski*, 29 M.J. 578, 580-81 (A.F.C.M.R. 1989). Where the Government seeks a substitute, that person must possess similar professional qualifications as the requested witness. *United States v. Robinson*, 24 M.J. 649 (N.M.C.M.R. 1987); *United States v. Tone*, 28 M.J. 1059 (N.M.C.M.R. 1989). Under some circumstances, independent experts cannot be replaced by government experts. *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990) (noting that

government-appointed consultant was not an adequate substitute for the independent assistance that the expert requested by the defense would have provided).

**d. The Assistance of Expert Medical and Mental Health Consultants Sought By The Defense Is Relevant**

(1) As detailed in the requests to the Convening Authority, Dr. Porterfield must conduct a comprehensive mental health evaluation of Mr. Jawad in order to determine, principally, what effect his lengthy confinement and treatment has had on his ability to accurately recall the events leading up to his capture and participate competently in his defense.

(a) Mr. Jawad was under the age of 18 at the time of the incident that led to his apprehension and has since that time been held in continual detention with adult detainees, often kept in solitary confinement, and provided no accommodation for his age. Mr. Jawad has spent most of the past six years in harsh conditions of confinement designed for maximum security of adult enemy combatants, without regard to his juvenile status. For extended periods, he has been deprived almost entirely of significant human contact. Dr. Porterfield would review the impact of the treatment Mr. Jawad has received and the conditions of confinement in the context of Mr. Jawad's competence and memory as well as issues relating to substantive defenses and sentencing. Her preliminary review suggests that there she will be able to present a number of relevant findings.

(b) In preliminary review of the 706 Board Report, Dr. Porterfield determined that there are significant problems with the report.

(c) As detailed above, Mr. Jawad was subject to serious abuse, maltreatment, and serial coercive interrogations that, at a minimum, constituted cruel, inhuman and degrading treatment. This treatment continues to impact his mental health and has proven to be a persistent obstacle in consulting with him and in preparing his defense. These are not "speculations" but practical difficulties his defense counsel has both experienced and observed.

(d) For example, when asked about the events underlying his case and his treatment over the past six years, Mr. Jawad has frequently expressed reluctance to discuss the details of his treatment and interrogation and even compared defense counsel with his interrogators who promise him things that never materialize. There is therefore a profound mistrust of his U.S. attorneys rooted in his treatment at the hands of interrogators and guards. To the extent this behavior is the product of an underlying mental condition, Mr. Jawad may well be unfit to stand trial.

(e) Given Mr. Jawad's age and the length of his confinement, common sense dictates that these conditions had a very high probability of negatively influencing his cognitive development. Whether this is so and whether their degree is so significant that they will impair his ability to stand trial is something that only a mental health expert can establish.

(2) An independent mental health assessment is relevant to evaluating the extent to which his interrogations, questioning and confinement have had any improper or unduly suggestive influences on any statements he has made since his capture.

(a) The prosecution is planning on building most of its case around the reports of statements Mr. Jawad is alleged to have made when he was younger than eighteen years of age, and possibly suffering from drug withdrawal. The findings and possible testimony of Drs. Keller and Porterfield are directly relevant and necessary to challenge the Government's evidence. In *United States v. Van Horn*, 26 M.J. 434, 438 (C.M.A. 1988), the Court of Military Appeals held that where the government proffers an interpretation of certain evidence as the only basis for a finding of guilt, to deny the defense a meaningful opportunity to challenge the reliability of the government's interpretation denies the defendant a fair trial. In *Van Horn*, the government built its case upon a urinalysis showing the presence of cocaine. The Court of Military Appeals held that it was reversible error for the defendant to be deprived of an expert witness, who could testify as to the unreliability of the particular method of urinalysis used to demonstrate guilt. Mr. Jawad's alleged "confessions" to interrogators are not transcribed, videos of the confessions have been lost or destroyed, and are not supported by interrogator notes - the statements would be clearly inadmissible in either a court-martial or a federal court. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); M.R.E. 802. At a minimum, introduction of such statements as evidence presents a novel method of truth-finding in criminal proceedings and the defense must have as much of an opportunity as the defendant in *Van Horn* did in contesting whether the urinalysis was adequate to proving guilt.

(b) In order for the defense to make informed arguments about the admissibility and weight of such statements, the defense must be allowed to present expert testimony on the psychological impact of war trauma and interrogation on juveniles.<sup>9</sup> In the absence of such expert assistance and testimony, the military judge will be unequipped to judge the admissibility of these statements and the military commission will be unable to evaluate adequately the weight such statements should be afforded.

(c) Evaluations and testimony by mental health experts as to the depth and duration of torture, coercion and the number of times and length of interrogations – and their effects on an adolescent – is critical to the determination of the admissibility of any statements made by the defendant.

(3) This testimony is further relevant and necessary because mental state at the time of the crime is an affirmative defense that cannot be asserted without an independent mental health assessment.

(a) "It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts." R.M.C. 916(k)(1); see also MCA § 949k.

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<sup>9</sup> The United States Supreme Court has held that a defendant was denied his 6<sup>th</sup> and 14<sup>th</sup> Amendment right to present a defense where he was precluded from presenting evidence about the environment in which a confession was obtained. *Crane v. Kentucky*, 476 U.S. 683, 688-91 (1986). The Court held that if the jury cannot hear such evidence, "the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689. The *Crane* court pointed out that this issue is entirely independent from the issue of the confession's voluntariness and that the Due Process Clause and the Confrontation Clause of the Sixth Amendment entitle a criminal defendant to "a meaningful opportunity to present a complete defense." *Id.* at 690.



(b) Without evaluations by mental health experts who understand child and adolescent development as well as the emotional and behavioral effects of trauma, threat or coercion by adults, the defense would be prohibited from exploring the defendant's mental state and his criminal intent, or lack thereof, at the time he allegedly committed these crimes.

(c) Moreover, the advice of juvenile health experts is necessary to determining what likely effects the illegal recruitment into Hizb-i-Islami Gulbuddin (HIG) had on Mr. Jawad. According to the government's own evidence, Mr. Jawad was recruited by 3-4 adults approximately 2 weeks before the alleged grenade attack. Mr. Jawad was misled by the adults he trusted. He was told he would be paid 12,000 rupees for a mine clearing job, however he was instead taken to training in caves, drugged and possibly sexually assaulted, and then provided with grenades and more drugs and ordered to commit an attack. Prior to this 2 week period, there is no evidence that Mr. Jawad was associated with HIG in any way.

(d) The psychological impact this illegal recruitment, involuntary drugging, and sexual assault would have had on him is critical to the formulation and presentation of defenses such as lack of mental responsibility. An element of the offense of Charge I, Attempted Murder in Violation of the Law of War, is that the accused "intended to kill the person or persons." M.M.C., Part IV, ¶ 15(b)(4). If Mr. Jawad was suffering from "altered consciousness," "cognitive impairment," or "loss of function," then he could not have had the requisite *mens rea* to be guilty of the charge.

**e. The Assistance of Expert Medical and Mental Health Consultants Sought By The Defense Is Necessary**

(1) A complete physical and mental health examination must be conducted in order to determine if Mr. Jawad has any physical or cognitive disorder or any syndrome that could impair his mental capacities, especially as they relate to his memory and understanding of the events around him.

(2) Such symptoms are usually associated with one or more traumatic events. His loss of a parent in war, the life events leading up to his recruitment, the experience during 2 weeks of alleged training, his involuntary intoxication, his injuries suffered upon apprehension (one Afghan officer reportedly held a gun to Mr. Jawad's head), are all examples of traumatic events that could have contributed to a mental disorder, condition or syndrome. In addition to Mr. Jawad injuries suffered during apprehension, he endures a variety of other physical ailments since his arrival at Guantanamo that are well documented in his medical records that could result in cognitive impairment.

(3) It is also necessary for a psychiatrist with expertise in adolescent development to assess what Mr. Jawad's level of cognitive development, awareness of his circumstances and capacity for independent thought and action would have been at the age when he was recruited, captured and alleged to have freely engaged in criminal conduct.

(4) The Convening Authority dismissed these asserted defense needs as merely "speculation of possible assistance". (CA's Denial at 2.)

(a) What the Convening Authority ignores, however, is that the very fact that Mr. Jawad was a juvenile at the time of these events casts his mental state into doubt. Indeed it was a juvenile's lack of capacity, "their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives," that made their crimes, even heinous crimes perpetrated in civilian life, undeserving of the death penalty. *Thompson v. Oklahoma*, 487 U.S. 815, n.23 (1988).

(b) Moreover, the administrators of JTF-GTMO were conscious of the needs of juvenile detainees during the lion's share of Mr. Jawad's incarceration. The consensus recommendation submitted by the JTF Surgeon, CAPT Shimkus, expressly noted "Exposure of pediatric detainees to adult detainees will have a high likelihood of producing physical, emotional, and psychological damage to the pediatric detainee." Recommended Course of Action for Reception and Detention of Individuals Under 18 Years of Age, dated 14 Jan 03 at 1 ("RCA") (Attachment ?).

(c) All other juvenile detainees, with the notable exception of Mr. Jawad and Omar Khadr were treated consistently with the RCA. Instead, Mr. Jawad was held without any consideration of his age or special vulnerability. Despite the government's repeated attempt to portray Mr. Jawad as a sub-human terrorist, who happily volunteered for this endeavor, all the available evidence indicates Mr. Jawad was a scared teenage boy, who was affected just as any other similarly situated teenager would be and who acted just as any other similarly situated teenager would act.

(5) When the defendant's mental capacity at the "time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *United States v. Mann*, 30 M.J. 639 (N.M.C.M.R. 1990). Indeed, counsel's failure to conduct a comprehensive mental health evaluation in a juvenile attempted murder case such as Mr. Jawad's constitutes professional misconduct and will ultimately be reversible error as "contrary to professional norms of competent assistance." *Burger v. Kemp*, 483 U.S. 776, 813 (1987).

(6) The accused is entitled to have access to a qualified physician and psychologist for presenting an insanity or mental capability defense. *United States v. Mustafa*, 22 M.J. 165, 169 (C.M.A. 1986); *see also United States v. Kelly*, 39 M.J. 235, 237 (C.M.A. 1994) (quoting *Ake v. Oklahoma*, 420 U.S. 68 (1985)). Consequently, where, as here, the mental state of the accused at the time of the alleged crime is in question, the defense must have access to qualified medical and psychological experts to adequately present a defense.

(7) Finally, the request for the services of both Dr. Keller, a forensic physician, and Dr. Porterfield, a clinical psychologist specialized in juvenile development and trauma, is necessary to conduct a comprehensive mental health assessment of Mr. Jawad.

(a) A clinical psychologist, such as Dr. Porterfield, is qualified to administer and interpret neuropsychological tests, such as intelligence, personality, and neuropsychological function tests as well as projective testing that could reveal any thought disorder. These tests can only be performed by a clinical psychologist and are necessary to the

kind of comprehensive psychiatric assessment that is required to rule out the kind of brain damage or personality disorder that would be difficult or impossible to detect by counsel or even a trained psychiatrist.

(b) A forensic physician, such as Dr. Keller, must integrate the neuropsychological findings provided by Dr. Porterfield with Mr. Jawad's family, medical and mental health history. Dr. Keller is uniquely qualified as a physician trained in evaluating victims of trauma to incorporate his evaluation of Mr. Jawad's physical and mental health, including a mental status examination, into a complete diagnosis.

### **The Denial of the Defense Requests and Requests for Reconsideration for Dr. Porterfield and Dr. Keller by the Convening Authority are Arbitrary, Capricious and an Abuse of Discretion**

The defense has more than adequately justified the need for the appointment at government expense of Dr. Porterfield and Dr. Keller under the relevant rules and applicable precedents. The denial of these requests by the Convening Authority is arbitrary and capricious and an abuse of discretion. Denial of the request for these experts by the military commission would deny the accused an effective defense and the right to a fair trial.

#### **f. The Defense Needs An Expert Investigator**

The defense's submission to the Convening Authority more than adequately justifies the defense need for an expert investigator and exceeds the showing required under the relevant rules and applicable precedents. The need for the investigator is set forth in great detail in Attachment 13. This request is incorporated by reference into this motion and the defense relies on the justification stated therein. Denial of the request for expert investigative assistance by the military commission would deny the accused an effective defense and the right to a fair trial. The Convening Authority's denial letter demonstrates a complete lack of appreciation of the challenges of effectively investigating a crime which occurred 6 years ago and more than 10,000 miles away in a war-ravaged country where few speak English and key witnesses and evidence have allegedly disappeared. The suggestion that a contract intelligence analyst and a paralegal with no investigative experience could effectively conduct a criminal investigation in this environment is absurd. While it is possible that defense counsel could conduct the investigation on our own (although we are not trained criminal investigators either), it is likely to be much more time consuming than turning the task over to a trained criminal investigator with experience and contacts in the region. It should be noted that the government does not rely on the prosecutors to conduct the criminal investigation. It relies on trained criminal investigators. Indeed, the government has the entire Criminal Investigation Task Force at its disposal, while the defense has nary a single investigative asset at our disposal. If the request for investigative assistance is denied, the defense will request an extended continuance to conduct our own investigation.

### **CONCLUSION**

The Convening Authority has engaged in an intentional pattern of unreasonable denials of defense requests for expert assistance, starting with the denial of the defense request for Dr.

Mullington<sup>10</sup>, continuing with the denial of the multiple requests for Professor Morris and culminating in the denial of the requests for Dr. Keller, Dr. Porterfield and Mr. Fechheimer. The determination of the Convening Authority to deny Mr. Jawad a complete and effective defense and to prevent him from having a fair trial cannot be countenanced by the military commission. The legitimacy of the process is at stake. The defense respectfully requests the commission take steps to ensure a fair trial for Mr. Jawad by appointing the experts requested in this motion.

6. **Oral Argument:** The Defense requests oral argument.

7. **Witnesses & Evidence:** The defense requests to submit the full report of the 706 Board ex parte. The defense relies on the attached documents as evidence in support of this motion. The defense will call the following witnesses

1. Dr. Allen Keller
2. Dr. Katherine Porterfield
3. Dr. Emily Keram

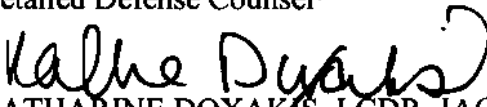
The defense requested productions of the above witnesses from the government on 18 September 2008. (Attachment 16) In less than ten minutes, the government responded via email with a denial. (Attachment 17) The government denial failed to comply with RMC 703 in that the trial counsel did not even attempt to explain why production of the requested witnesses was not required.

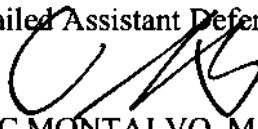
8. **Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution has previously supported the request for an independent physician to be part of the defense team.

9. **Request for Public Release:** The defense requests permission to release the government's response to this motion and the court's ruling as soon as possible.

Respectfully Submitted,

  
By: DAVID J. R. FRAKT, Major, USAFR  
Detailed Defense Counsel

  
KATHARINE DOXAKIS, LCDR, JAGC, USN  
Detailed Assistant Defense Counsel

  
ERIC MONTALVO, MAJ, JAGC, USMC  
Office of the Chief Defense Counsel  
Office of Military Commissions

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<sup>10</sup> The request for Dr. Mullington was granted by the Convening Authority on reconsideration after the initial denial.

**10. Attachments:**

1. Request for Appointment of a Confidential Expert Consultant Dr. Katherine Porterfield to the Defense Team dated 5 Aug 08
2. Request for Appointment of a Confidential Expert Consultant, Dr. Allen Keller, to the Defense Team dated 18 Aug 08
3. Memorandum from the Convening Authority, Response to Request for Expert Consultant dated 20 Aug 08
4. Memorandum from the Convening Authority, Response to Request for Expert Consultant
5. Request for Reconsideration dated 22 Aug 08
6. Request for Reconsideration of a Confidential Expert Assistant, Dr. Allen Keller, to the Defense Team, dated 3 Sep 08 (without attachments)
7. Memorandum from the Convening Authority dated 3 Sep 08
8. Memorandum from the Convening Authority dated 9 Sep 08
9. [REDACTED]
10. [REDACTED]
11. [REDACTED]
12. [REDACTED]
13. Request for Investigator dated 27 August 08
14. CA response to request for investigator dated 17 September 08
15. RMC 703 Defense Witness Request dated 18 September 2008
16. LtCol Stevenson email response to Defense Witness Request dated 18 September 2008

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

D-023

**Government Response**

To Defense Motion for Appointment of Expert  
Consultants (Keller and Porterfield) and  
Defense Investigator (Fechheimer)

22 September 2008

1. **Timeliness.** This Government Response is filed within the timeframe set by the Military Commissions Trial Judiciary Rules of Court.

2. **Relief Requested.** The United States requests that the Commission deny the 18 September 2008 defense motion requesting the Commission direct the employment of Dr. Allen Keller as a defense consultant in the field of forensic medicine, Dr. Katherine Porterfield as a defense consultant in the field of clinical psychology, and Mr. David Fechheimer as a defense investigator. The Convening Authority has denied multiple requests for employment and funding of these individuals to assist defense counsel on the grounds that defense counsel have failed to establish their relevance and necessity as required to justify their employment at Government expense. *See* R.M.C. 703(d).

3. **Burden of Proof.** The burden is on the defense to establish the relevance and necessity of the requested expert assistance at Government expense.

4. **Facts**

- a. Agreed.
- b. Agreed.
- c. Agreed.
- d. Agreed.
- e. Agreed.
- f. The Government agrees that on 22 August 2008, the defense submitted a request for reconsideration to the Convening Authority for appointment of Dr. Porter to the defense team at Government expense.
- g. The Government agrees that on 3 September 2008, the defense submitted a request for reconsideration to the Convening Authority to appoint Dr. Keller to the defense team.

- h. Agreed.
- i. Agreed.
- j. For the sake of argument/discussion, the Government will concede that the accused's life has included exposure to some violence and war. The Government disagrees and disputes that the accused was subjected to physical or psychological abuse, maltreatment, coercion, or torture of any kind since his apprehension on 17 December 2002. The evidence in this case is that one or more individuals on 17 December 2002 noted the accused looked like he might be under the influence of "something," or might just have well just been "tired," "shocked," or "stunned" from the events of the day. This is quite understandable, as he had started his day by committing a violent crime, had been apprehended, and then spent a long day in custody subjected to hours of questioning, which presumably is not how he had anticipated his day going. It should be noted that a drug screen conducted the following day by medical personnel at Bagram produced negative results.

The defense's allegation that accused was "subjected to forced nude photography" is misleading. The accused was examined upon his transfer to U.S. custody on 17 December 2002 by medical personnel, and his physical condition was documented photographically for medical purposes and in the event of future false claims of abuse like those that are currently before this commission. Based on at least some of the testimony received by the Commission at the last hearing, the accused was never, to the Government's knowledge, subjected to "solitary confinement"; however, he was occasionally placed in isolation for periods of time, which is an acceptable and legitimate aspect/consequence of confinement or detention. There is no documented proof that the accused was ever pushed down stairs—other than the accused's own claims to one investigator.

The Government denies the accused was ever subjected to abusive treatment by any guards at Guantanamo Bay, Cuba. The accused was placed in segregation upon his initial arrival at Guantanamo, which is standard operating procedure for confinement/detention facilities worldwide—especially military ones dealing with violent criminals. The accused may have been subjected to linguistic isolation, although the Government does not see how not being allowed to speak to someone in one's own language can be considered abuse, let alone torture. As far as the "frequent flyer program" goes, the Commission heard in great detail during the last hearing that this was a program designed to instill good order and deal with "problem detainees," like the accused, who misbehaved on occasion. By no stretch of the imagination can this be considered abuse or torture.

- k. The Government agrees that on 27 August 2008, the defense submitted a request for appointment, at government expense, of Mr. David Fechheimer as a defense investigator, and that this request was denied by the Convening Authority on 17 September 2008.

## 5. Law and Argument

a. The Government agrees that the law concerning appointment of an expert as a defense consultant at government expense is well settled. An accused is entitled to expert assistance provided by the Government if he can demonstrate necessity. See *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). In order to demonstrate this requisite necessity, an accused “must demonstrate something more than the mere possibility of assistance from a requested expert,” but rather “must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.” *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994) (quoting *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987)). Specifically, the defense must satisfy the three-prong test for determining necessity: (1) Why is the expert needed? (2) What would the expert accomplish for the defense? (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would develop? See *United States v. Gonzalez*, 39 M.J. 459, 461 (1994).

b. As to Dr. Keller and Dr. Porterfield, the defense premises its entire “relevance and necessity” argument upon the unsupported facts that the accused was a juvenile at the time of his apprehension and initial interrogations, and has been subjected to torture since his apprehension and custody. There has not been one scintilla of evidence in this case that the accused was subjected to anything amounting to either torture or physical or psychological abuse. Additionally, at the time of his grenade attack the accused was 17, 18, or older. The “torture” the defense alleges occurred was at a time when the accused was 18-24 years of age—i.e., clearly not when he was a “juvenile” even by the most liberal definition. Dr. Porterfield is an expert in “trauma and torture.” Assuming this is so, how would her expert assistance be *relevant* to any of the facts in this case? Dr. Keller apparently has specialized experience in dealing with “victims of abuse, trauma, and torture.” Again, assuming this is so, how would Dr. Keller’s expert assistance be *relevant* to any fact at issue in this case? The Commission need not even get an analysis of the three-pronged necessity test—the areas of expertise of these two individuals are *not relevant* to any fact at issue in this case.

c. It also cannot be stressed enough in this case that the accused and, just as significantly, his defense team, have had the benefit of a fully competent and professionally accomplished R.M.C. 706 Board, which made an in-depth inquiry into the accused’s mental condition. The defense has thus had the benefit of hours of expertise in the area of mental health related issues. The expert assistance the accused and his defense team have received in this regard may not have been to the degree of specialty in the areas of mental health that Drs. Keller and Porterfield possess, but, again, the specialties cited to by the defense are not relevant to this case, nor does the law require that the defense be given the *most specialized* expert assistance possible—only that it meet the requirement to adequately defend their client and ensure a fair trial.

d. Turning to the specific grounds which the defense claims justify requiring the government to provide *even more* expert assistance in the field of mental health than has been provided to date, the defense cites both Dr. Keller’s and Dr. Porterfield’s need to conduct “more detailed” and “more comprehensive psychological assessments” than were conducted at the



R.M.C. 706 Board. The defense cites “significant problems” with the R.M.C. 706 Board conducted in this case, such as allegedly not adequately taking into account the accused’s reluctance to discuss details of his treatment and interrogation with defense counsel as a possible “product of an underlying mental condition” that may “make the accused unfit for trial.” It takes someone with Dr. Keller’s or Dr. Porterfield’s medical pedigree to properly evaluate this fact? This is a nuance that two forensic psychiatrists in the grade of O-6 with years of experience could not properly evaluate?

e. What the defense appears to be stating—without being able to point to a single real fault or deficiency of the prior Sanity Board assessment—is that only someone with Dr. Porterfield’s and Dr. Keller’s credentials can *truly assess* the accused’s ability to stand trial. This is simply absurd. The two highly qualified forensic psychiatrists who completed the 706 Board, both with years of experience under their belts, clearly were able to competently assess whether the accused is presently suffering from a mental disease or defect (Answer: No); whether the accused can rationally understand the proceedings against him and participate in his defense (Answer: Yes); and whether the accused is in need of any immediate psychological or medical treatment (Answer: No). What is really at issue here is that the defense simply does not like the conclusions that the 706 Board reached, and so they now desire Drs. Keller and Porterfield to perform “an independent mental health assessment,” claiming this is necessary for them to provide an adequate defense for their client. Bottom Line: The defense already received such an unbiased, “independent” mental health assessment, and the law does not require the Convening Authority to fund a defense mental health “fishing expedition” in an attempt to reach different conclusions.

f. Paragraph 5 d. (2) (a) of the Defense Motion deserves specific comment. The defense begins by stating that the “prosecution is planning on building most of its case around the reports of statements [the accused] is alleged to have made when he was younger than eighteen years of age, and possibly suffering from drug withdrawal,” tying these “facts” to the case of *United States v. Van Horn*, 26 M. J. 434 (C.M.A. 1988). First of all, whether the accused was 17, 18 or 19 at the time of his statements, how is this *relevant* to any fact that will be at issue in this case and *why would this necessitate* the expert assistance of these two particular experts? Second, *Van Horn* was a litigated urinalysis case where the prosecution’s case was based almost entirely upon the testimony of a forensic toxicologist, who explained the extremely complicated scientific/technical process for drug testing and interpretation of urinalysis results. Short of a case involving interpretation of DNA evidence, it does not get more complicated scientifically than that. The testimony of eyewitnesses to the accused’s grenade attack and to his subsequent confessions (on 17 and 18 December 2002) that he “threw the grenade,” that “he was proud of what he did and would do it again,” and that he “targeted the Americans” is certainly not a “novel method of truth finding” necessitating expert assistance to ensure a fair trial. The case against the accused is a classic form of “I saw him do this” and “I heard him say that,” which is about as *unscientific* as it gets in the litigation world. How does presentation of this type of evidence without expert assistance “deny the defense a meaningful opportunity to challenge the reliability” of the Government’s case?

g. The highest military court in *Van Horn* correctly held that when the government’s case is built on forensic evidence, denial of expert forensic assistance to the defense may well

prevent them from presenting a meaningful defense. Anyone who has defended a “naked urinalysis” case knows that the defense is virtually “blind” without such expert assistance of its own. The Court has similarly found error in denying the defense expert assistance when the Government case rests largely upon forensic image analysis. See *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2007). The holdings and rationale in *Van Horn* and *Lee* have nothing to do with the issues that will be litigated in this case. The government will not be offering forensic or scientific evidence to establish the accused’s guilt. The defense has already received confidential expert assistance in the field of mental health via an R.M.C. 706 Board. The Commission should not justify requiring the funding of additional, “*fishing expedition*” expert assistance based on unsubstantiated, and in many cases, refuted allegations of “abuse” and “torture.” The issue of coercion as it relates to admissibility of the accused’s statements is a legal determination that the Commission can well make based on the facts themselves, without the opinions of any experts in the field of mental health.

h. Regarding the assertion in paragraph 5 d. (3) (d) that the accused might not have had the requisite *mens rea* to commit the charged offense, and that additional expert assistance is therefore required, is similarly without merit. Especially in a case such as this, where forensic evidence is not being presented by the Government, effectively mounting a defense does not require the additional (i.e., beyond what has already been provided from the experts who conducted the R.M.C. 706 Board) mental health expertise to raise a “he-might-have-been-drugged” defense. This is an issue in almost every case where an accused is charged (as here) with an offense that requires *specific intent*. The defense can clearly prepare for presentation of such a defense without the expert assistance they are requesting.

i. As to the defense request that the Commission direct the Government to provide funding for Mr. Fechheimer as a defense investigator, the defense has failed to meet the three-prong necessity standard for expert investigators that must be met pursuant to *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). The defense claims that it needs to conduct an independent investigation in order to ensure there is a fair trial in this case, as if no investigation had been completed and no evidence provided to them. Additionally, the previous defense counsel accompanied the previous lead government counsel to Afghanistan just last December, capping the visit off with a series of depositions of Afghani eye-witnesses to the accused’s attack and/or confessions. That leaves only a possible follow-up visit (if the current defense counsel so desires) to re-interview witnesses and visit the scene of the crime. This does not require a trained investigator and is simply called “lawyer follow-up.” The defense has failed to justify government funding for Mr. Fechheimer because it has not shown, and cannot show, why the defense is unable at present to do whatever is needed from its “investigative expert.” Defense needs someone to do some “leg work” and “follow up question-asking” in Afghanistan. One or more of the current defense team is certainly capable of accomplishing that.

**6. Oral argument.** The United States rests on this brief and its accompanying materials but is ready to present oral argument, if necessary.

**7. Witnesses and Evidence.** The defense has requested production at government expense of two (2) of the very witnesses for which they are seeking a ruling from the Commission requiring government funding. The defense questions in its Motion why such a quick response

came back from the Government “denying” production of two of the very witnesses for which the Convening Authority had refused funding. Again, the Convening Authority has not approved funding of any sort for these experts, to include travel and expert assistance fees. Absent Convening Authority approval, only the Military Judge can direct funding at government expense, which can happen only after a determination that the defense has met its legal burden of demonstrating the witnesses’ relevance and necessity. As that has not occurred, the defense’s request for production of these witnesses has been denied.

Respectfully submitted,

Douglas M. Stevenson  
Lt Col, USAF  
Prosecutor

John P. Ellington  
CDR, USNR  
Prosecutor

A handwritten signature in black ink, appearing to read "A. Gaston III", with a stylized flourish at the end.

Arthur L. Gaston III  
LCDR, USN  
Prosecutor

Office of the Chief Prosecutor  
Office of Military Commissions



UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD


**D-023**  
**RULING ON DEFENSE REQUEST**  
**FOR EXPERT CONSULTANTS**

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1. On August 5, 2008, the defense requested the Convening Authority appoint Dr. Katherine Porterfield to the defense team as an expert consultant in clinical psychology. On August 18, 2008, the defense requested the Convening Authority appoint Dr. Alvin Keller to the defense team as an expert consultant to conduct a forensic/medical evaluation of the Accused. The Convening Authority denied the request for Dr. Porterfield on August 20, 2008 and Dr. Keller on September 2, 2008. The Convening Authority denied requests for reconsideration for both Dr. Porterfield and Dr. Keller on September 3 and 9, 2008, respectively.
  2. On August 27, 2008, the defense requested the Convening Authority appoint Mr David Fechheimer to the defense team as an expert investigator. The Convening Authority denied the request on September 17, 2008.
  3. The Defense request for expert assistance in clinical psychology is GRANTED. If the government does not intend to provide Dr. Porterfield, an adequate substitute must be identified not later than 1700 hours October 6, 2008.

The scheduled December 8-19, 2008 pretrial session and trial dates of January 5-16, 2009 remain.

4. As the defense has not shown the necessity for such assistance, the requests for Dr. Keller and Mr. Fechheimer are DENIED.

So ordered this 30<sup>th</sup> day of September 2008:

/s/   
Stephen R. Henley  
Colonel, US Army  
Military Judge